REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 94 of 1997

EASTERN PRODUCE (K) LTD……..……..……..APPELLANT

VERSUS

WILSON MARITIM BETT…….RESPONDENT

JUDGMENT

This is an appeal from the Judgment of F.M. Kinyanjui Resident Magistrate in Kapsabet Principal Magistrates Civil suit No. 72 of 1995 delivered on 8th November 1997. In the Judgment the learned magistrate found the appellant 100% LIABLE in negligence and awarded respondent general damages in the sum of Kshs.70,000/=, special damages of Kshs.1000/=, costs and interest. The appellant (who was the defendant in the subordinate court) having BEEN aggrieved by the decision of the learned magistrate, has appealed to this court listing four grounds of appeal, that:-

1. The learned Resident Magistrate erred in law and fact in making an award in general damages in favour of the respondent that was too excessive in the circumstances.

2. The learned Resident Magistrate erred in law in finding the appellant liable in negligence.

3. The learned Resident magistrate erred in law in failing to take into account the appellant's submissions.

4. The learned Resident Magistrate erred in law and fact into account the evidence given in favour of the appellant.

When the appeal came up FOR hearing on 8/11/2005, Mr. Shivaji

for the appellant submitted that the award of general damages by the learned magistrate was excessive. His contention was that the respondent admitted in evidence that the injuries were superficial. There was no evidence that the respondent was receiving further treatment to warrant the conclusions of the magistrate that the injuries were serious as, the medical report showed that the injuries had healed well. He further argued that the respondent's counsel only asked for general damages of Kshs.55,000/=. Therefore the learned magistrate erred in making an award of general damages of Kshs.70,000/= which

was outside what was request for by the parties.

On the second ground of appeal he submitted that the learned

magistrate erred in finding the appellant liable in negligence. His contention was that the magistrate did not make any finding on breach of duty or contract. He made a finding on omission to provide petroleum jelly and protective clothing which constituted tortuous negligence. The amended plaint was filed on 5/4/95 which was six years from time of occurrence of the accident, which was outside the 3 years allowed for filing actions on tort as required under section 4 of the Limitation of Actions Act (Cap. 22). Since no extension of time to file suit was granted by court, the learned magistrate erred in awarding damages while the suit was stature barred.

On grounds 3 and 4 of appeal, he submitted that the learned

magistrate erred in failing to consider the evidence and submissions of the appellant. The evidence of the appellant was that the respondent was not on duty. That evidence was highlighted in the submission on behalf of the appellant, which the learned magistrate did not consider. It was his contention that the respondent did not prove his case on the balance of probabilities.

Mr. Obiero for the respondent opposed the appeal. He

submitted that the suit was a claim for breach of duty in an employment contract. The cause of action was valid for 6 years. In addition, the appellant did not raise the issue of limitation during the hearing of the case and could therefore not raise it on appeal.

He further submitted that the evidence of Samuel Nganga

(DW1) was wanting and therefore the learned magistrate was right in rejecting the same. His evidence was that he prepared the daily task sheets, but the sheets were actually prepared by other people. These documents did not have any evidential value and the magistrate was correct in rejecting them. His contention was that the evidence of the respondent was not challenged.

On the damages awarded, he submitted that the injuries as

evidenced in the medical report were serious. The court was not bound to go by submissions of parties. It therefore had a discretion to award damages that were higher than what the parties had asked for. In any event one of the case authorities cited was for an award of Kshs.100,000/=

Briefly,, the facts are that the plaintiff (respondent) gave evidence as PW1, and produced the medical report (exhibit 1) in the absence of the doctor. His evidence was that on 8/7/89, he was on duty at Kapsummbeiywa Tea Estate weeding. He was told to go and apply lime fertilizer to the tea bushes. He was not provided with protective clothing. He was injured by the tea bushes and the fertilizer entered into the injured parts. He suffered scars. He reported to the manager and went to Nandi Hills hospital for treatment. He testified that he was burnt by the lime. The doctor's report on the injuries was produced in the absence of the doctor who was doctor Oruro Sam Ben. The doctor found that the feet, both legs, and chest had multiple minor scars which were well healed. In his view, the respondent suffered severe chemical burns as a result of lack of protective wears at his work place. The scars were permanent, but the itching might gradually improve with time and some more medication.

The defence case was the testimony of Samuel Mwangi Nganga (DW1). He testified that he was a supervisor of the appellant. On 8/7/1989 he was on duty. There were a number of employees applying fertilizer to tea shrubs. The respondent did not come on duty that day. No report of an accident was made to him. He produced the duty task sheet for 8/7/1989.

I have considered the appeal and the submissions of counsel for the parties. I have considered the evidence on record.

The first issue is the argument advanced by counsel for the appellant that the suit was statute barred. That was not a ground of appeal. It was also not raised in the subordinate court at the trial. Therefore it should not have been raised on appeal. Indeed it appears to have been an afterthought. The plaint and the whole case is based on the premise that the respondent was on duty, when he was injured. That obviously means that the case was based on breath of duty of care by an employer to an employee. The case was based on contract and not on tort. The argument that the suit was statute barred cannot therefore be sustained, as the limitation period for contractual claims under section 4 (1)(a) of the Limited of Actions Act (Cap. 22) is six (6) years.

The second issue is whether the learned magistrate failed to consider the defence of the appellant and submissions. The judgment of the leaned magistrate was a brief one. The learned magistrate, after observing that the respondent suffered injuries from severe burns went ahead to find that the appellant did not provide the respondent with petroleum Jelly and other protective clothing. He went on to find the appellant 100% liable.

At no point did the learned magistrate consider the evidence for the respondent as against that for the appellant, to come to the conclusion that the respondent proved his case on the balance of probabilities . The respondent however, testified that he was injured by the tea bushes and the lime fertilizer entered into the injuries on the legs and feet. The doctor found that the respondent had severe burns even to the chest. The appellant's evidence (by DW1) was that the respondent was not on duty and therefore he was injured elsewhere. DW1 testified in cross-examination that a clerk prepared the check roll but he prepared the task sheet. The tasks sheets produced showed that there were other workers doing the fertilizer job that day. He maintained that the respondent was not on duty that day otherwise his name would have been in the task sheets.

The respondent did not call any other person or worker to support his story that he was on duty. He did not say who told him to apply fertilizer to tea bushes. He did not name or describe the manager he reported the accident to, nor did he give the date he reported to the manager. The burden was on him to prove that he was indeed injured while on duty. The appellant's witness denied that the respondent was on duty on the material day. In my view, the respondent did not discharge his burden of proving his case on the balance of probabilities. He did not prove that he was injured on duty. If the learned magistrate had weighed the plaintiff's evidence against the defence, he would not have reached the conclusion that he came to. I am of the view that the respondent did not establish that he was injured on duty, and therefore the issue of negligence of the employer did not arise. The appellant was therefore not negligent.

On the general damages awarded, the award of general damages is a discretion of a trial court. An appellate court will be slow to interfere unless it is satisfied that the trial court applied wrong participles (as by taking into account some irrelevant factors or leaving out some relevant one) or misapprehended the evidence and so arrived at a figure so in ordinatelly high or low as to represent an entirely erroneous estimate (see Catholic Diocese of Kisumu –vs- Sophia Achieng Tete – Kisumu Civil Appeal No. 284 of 2001 unreported) The submissions made by counsel for the parties are merely arguments meant to persuade the court. They are not binding on the court. The respondents counsel asked for general damages of Ksh.55,000/=. Though counsel for the appellant has argued on appeal that the injuries were superficial, that is not what is contained in the medical examination report. The learned magistrate must have been persuaded by the injuries in the medical examination report, which he was entitled to. Dr.Oruro found injuries spread on both legs, feet and chest. He concluded that the respondent suffered severe chemical burns. The scars, though healed, were permanent and the itching might gradually improve with time and some more medication. I do not agree with counsel for the appellant that the injuries sustained could not justify an award of general damages in the sum of Kshs.70,000/=. However, I have already found that the appellant was not proved to be liable in negligence. Therefore general damages are not recoverable.

As I have found that the respondent did not establish a case of negligence against the appellant, this appeal has to succeed.

Consequently, I allow the appeal and set aside the decision of the learned magistrate.

As the case has been between an employer and employee, I order that each party bear their own costs of appeal as well as proceedings before the subordinate court.

Dated and delivered at Eldoret this 14th day of June 2006.

GEORGE DULU

Ag. JUDGE